United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B P/S

- x

JAMES F. HEIMERLE, :

Petitioner-Appellee :

-v.- : 77-2119

UNITED STATES OF AMERICA, :

Respondent-Appellant :

- x

APPEAL FROM THE UNITED
STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF NEW YORK

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APPELLE'S BRIEF

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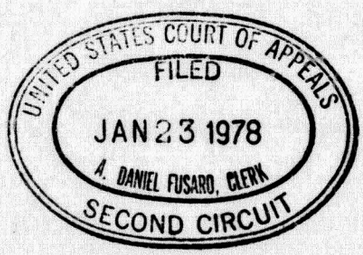

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JAMES F. HEIMERLE, :

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-v.- 77-2119 :

UNITED STATES OF AMERICA, :

Respondent-Appellant :

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BRIEF ON BEHALF OF PETITIONER-APPELLEE

JAMES F. HEIMERLE

PRELIMINARY STATEMENT

Pursuant to Rule 28 (b) Federal Rules Appellate Procedure appellee corrects the inaccuracies and omissions in appellant's preliminary and statement of facts.

INTRODUCTION

The United States of America appeals pursuant to Title 18, United States Code, Section 3731 from a decision and order rendered in a civil action by the Honorable Robert L. Carter, United States District Judge, dismissing an indictment with prejudice to the Government.

The Government did not deem necessary to explicate the two docket numbers referred to in the Order of the Court below, viz, 76 Civil 4277 and 76 Civil 5669.[1] One of which, the former, had been denied in the Court below in the first decision and order (G App p. A-53)[2] couched in the term " Since claims of violations of his constitutional rights also have no substance,

1. 76 Civil 4277 was docketed on September 28, 1976. It was filed as a petition for coram nobis under the All Writs Statute; was docketed by the Clerk as a § 2255. (H App p. 32,34)
2. G.App will refer to Government Appendix. H.App Heimerle Appendix. H.Br. and G.Br. will be either parties brief.

the motion is without merit and must be denied." (H App p.34). Heimerle thereafter duly filed Notice of Appeal. The appeal was docketed as 77-2060.[3] Upon reconsideration the Court vacated sentence and dismissed the indictment based upon Heimerle's motion as it related to the violations of the Interstate Agreement on Detainers (G App p.A-58,59). The Court, however, at no time passed on the merits of 76 Civil 4277, notwithstanding Heimerle's repeated attempts (H App p.51,82). Then, this appeal followed.

APPELLE'S STATEMENT OF FACTS

On December 6, 1972 Heimerle was indicted with others by a Grand Jury sitting in and for the Southern District of New York charging violations of Title 18, United States Code, Sections 371, 472, 473 and 2. This indictment, 72 CR 1330, is the subject of the instant appeal. Heimerle and one other person were indicted additionally for violations of Title 18, United States Code, Sections 1341 and 371. This indictment, 72 CR 1331, is the subject of another appeal presently docketed as 77-2131.[4]

On January 18, 1973 Heimerle was writted in from New York State Prison, located in Ossining New York, for the sole purpose of prosecuting Heimerle on the charges contained in both indictments.[5] Immediately thereafter, Heimerle was lodged at Federal Detention Headquarters (West St.). On the very next day, January 19, 1973, the Government filed Notice[s] of Readiness to prosecute Heimerle on the charges contained in both indictments. (G App p.A-16) (H App p. 35, 19,20)

On or about February 23, 1973 Heimerle was returned to New York State Prison without objection by the Government

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3. The appeal was dismissed prior to the brief & appendix being submitted(H App p.78), the issue therein,i.e., unconstitutionally procured wiretaps has never been ruled upon(H App p.73-77); dismissal of indictment(G App p. A-4) precluded ruling on the merits (H App p.82), even after Heimerle was notified of Government's motion for reconsideration(H App p.49-51)

4. At that time Heimerle was serving a 4 yr. term of imprisonment (cont'd)

which was contra to Heimerle's requests to remain at West St. to confer with counsel;made to the United States Marshalls.

On or about March 19, 1973 Heimerle was writted in from New York State Prison once again, to provide Court Ordered voice examplars in regard to the charges contained in both indictments (H App p.6,2). Heimerle's attorney requested that Heimerle be lodged at West St. to confer with prior to trial (H App p.15,21), the Court deemed it unnecessary, id.[6] Heimerle was thereafter returned to New York State Prison, located in Ossining,New York. Shortly thereafter, Heimerle was transferred further from New York City to Stormville,New York. Heimerle's counsel could not spare the time to make the trip due to the fact that all visiting ceased in early afternoon.

On May 3, 1973 Heimerle was writted in from GreenHaven State Prison, Stormville, New York. Once again for prosecution on the charges contained in both indictments. Upon arrival at the Foley Square CourtHouse trial commenced, after a five day trial; Heimerle was found guilty. Sentence was set by Judge Carter for June 18, 1973. Judge Brieant adlourned the writ to Heimerle's sentence date in Judge Carter's case. (G App p.A-10).

On June 18, 1973 Heimerle's co-defendant with his attorney present changed his plea to guilty. On June 20, 1973 co-defendant was sentenced. Heimerle trial adjourned to September 24, 1973.(H App p.36).

On July 6, 1973 Heimerle was returned to GreenHaven State Prison, Stormville, New York. This writ satisfied by Judge Carter. (G App p.A-9).

FOR the identical crime(same act)as indicted for in 72 CR 1331, viz,Airline Ticket; all stemming from joint federal state investigation. On December 13, 1972 Heimerle was sentenced concurrently in another state court for airline ticket.

5. The Government failed to furnish this writ ad pros in their Appendix, when, indeed, the initial writ caused the Court to dismiss the indictment. Nor did they furnish second writ ad pros.

6. c.f. Rule 18, F.R.Cr.P."..the Court shall fix the place of trial within the district with due regard to the convenience of the defendant.."

that relates to 78 Civil 4277 (T.H.) supra), the issues of which have not been reviewed to date.

QUESTIONS PRESENTED

(1) MUST THIS APPEAL BE DISMISSED FOR LACK OF APPELLATE JURISDICTION UNDER 18 U.S.C. § 3731 WHEN THE ORDER BEING APPEALED WAS ENTERED IN CIVIL PROCEEDING?

a) if affirmative was time for filing notice of appeal under 28 U.S.C. § 1291 waived by failure to properly do so?

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7. Factually the Government did before Judge Brieant exactly what they did in another Federal Courtroom in a different part of the country on the same day i.e., admitted the violation, see (H App p.63,58). On the very next day stood mute in another dismissal -- then as an after thought argued that dismissal was improper. c.f. U.S.v.Cumberbatch, 563 F.2d.49n.2.

8. This position is not inconsistant with Enright & Edwards (G Br p.6). However, Edwards & Heimerle are not. i.e., Heimerle's prosecution dragged on over a period of one-and-one-half years and no less than five (5) writs ad pros issued, concededly by the Government c.f. Government statement of facts (H App p.38,39)

On December 15, 1976 Judge Brieant vacated Heimerle's conviction and dismissed the indictment pursuant to Heimerle's petition. However, Judge Brieant stayed the issuance of the writ pending appeals (H App p.67). The Government thereafter made a motion to reconsider wherein they impute that they did not have an opportunity to respond to Heimerle's petition (G App p.A-41). Judge Brieant stated otherwise"..<u>the Government did not wish to answer</u>" (H App p.69).[7] At length, after many-many months of unrelentless pursuit, including briefs to the Court of Appeals--decisions to the Court from the Court of Appeals, and, of course, the knowledge that the Special Litigation Department had become vitally concerned with the issue (H App p.60). The Court vacated his previous Order and at the same time maintained the correctness of the first Order (H App p.70).[8]

On December 17, 1976 Heimerle filed the petition now under discussion in this instant case in addition to the petition

SENTENCE/CONVICTIONS ON INDICTMENTS THAT WERE [illegible]

WHEN DEFENDANT APPEARED BEFORE THE COURT?

a) particularly so when mandates dictate indictment must be dismissed by the court - and only the court and other government officials - were compelled by Oath to be aware of said mandates

b) can defendant-prisoner waive a right he knew not about - which right constituted an absolute defense - then be precluded from raising said right in a § 2255 proceeding?

(4) IS IAD WITHIN FIFTH AMENDMENT RIGHT TO PROCEDURAL DUE PROCESS - DUE TO UNEQUIVOCAL COMPELLING LANGUAGE THEREIN?

a) did failure to comply with terms & conditions constitute dereliction of duty amounting to nonfeasence by persons compelled to enforce said terms?

b) if negative was defendant denied basic Sixth Amendment right to assistance of counsel in what would then have been a criminal proceeding?

(2) MUST THE INDICTMENT DISMISSED BELOW BE LEFT UNDISTURBED WHEN INDICTMENT WAS FACTUALLY DISMISSED WITH PREJUDICE?

a) does this court have authority to usurp the function of the grand jury by reindicting on charges not resubmitted to a grand jury?

b) does reindictment afford fullpanoply of due process rights - arraignment, trial, appeals, etc. - once again?

c) does full panoply of due process rights on reindictment violate double jeopardy, res judicata and collateral estoppel?

(3) MUST THE COURT AND OTHER GOVERNMENT OFFICIALS OBEY THE MANDATES OF CONGRESS[IAD ART.IX, §§ 5 & 6] AND PREVENT ILLEGAL

(5) MUST THIS COURT UPON REVERSAL OF THE LOWER COURT'S ORDER: ORDER RESCHEDULED THE APPEAL FROM THE LOWER COURT ORDER IN RE 76 CIVIL 4277?

a) particularly so when after many many months of dormancy - the petition was summarily dismissed?

ARGUMENT

The appellate jurisdiction over the instant appeal is not sanctioned by the statute conferred; since 18 U.S.C. § 3731 comes under the Criminal Appeals Act, and the Order herein being appealed bottoms on Civil Proceedings, i.e., 28 U.S.C. § 2255 - (Ch.153, U.S.C.A. 3 Volumes). The appeal must be dismissed for lack of appellate jurisdiction. " A federal court is always required to examine its own jurisdiction." Esola v. Groomes, 520 F.2d. 830,834n.16, also see, F.R.Civ.P. Rule 12 (h)(3).

> The Supreme Court has held or stated that an appeal from a decision on a motion under 28 U.S.C.S. § 2255 is governed by the rules dealing with civil appeals rather than by the Criminl Appeals Act. United States v. Hayman(1952) 342us205,96 L Ed 232, 72 S Ct 263; Andrews v. United States (1963) 373us334, 10 L Ed 2d 383, 83 S Ct 1236. (Accord Davis v. United States, 417us333, 41 L Ed 2d 109, 94 S Ct 2298:at p. 1206 § 8 of 41 L Ed)

If, however, after examing appellate jurisdiction this Court determines that said jurisdiction exists. Well, then, Heimerle submits that the proceeding below would have then been a criminal proceeding - whereat, Heimerle was deprived of his Sixth Amendment right to assistance of counsel. Powell v. Alabama,287us45,68-69 (1932); Argersinger v. Hamlin, 407us25; Gideon v. Waignwright, 372us335.

It cannot be a criminal proceeding for Government appealability on the one hand — and a civil proceeding on the other, to avoid the fundamental right to have assistance of counsel in a criminal proceeding.

The leading cases subsequent to the amendment(Omnimbus Crime Control Act of 1970 - 18 U.S.C. § 3731[1970]), have dealt with Government appeals from pre-trial (suppression etc.) motions Serfass v. United States, 420us377,394 (1975); and post-trial (F. R.Cr.P. Rule 29) orders United States v. Wilson, 420us332,344-45

None of the decisions are dispositive of the issue h e-in, viz, post-judgement dismissal of a criminal indictment in a civil proceeding - with prejudice (G App p A-4,59,62), where the sentence was served, and fine paid(G App p.A-25,86n.1)and: the Government in another proceeding had to concede the conviction for enhancement purposes as being a nullity (H App p.81).

Thus, should the Government be successful in overcoming the jurisdictional barrier; this Court would not be authorized to Order the Court below - to re-instate the indictment that has factually been dismissed. It was a final Order - and executed as such (G App p.A-4) c.f. (H App p.30,31).

The Government erred by not indicting via a Grand Jury pursuant to 18 U.S.C. § 3288, c.f. United States v. Macklin, 535 F.2d. 191. However, re-indictment in the posture of the instant facts and circumstances - may have been barred by double jeopardy standards. See United States v. Jenkins, 420us358,370.

In any event this indictment under discussion [72 CR 1330] must be left undisturbed, and this appeal must be dismissed if for no other reason than; this Court does not have appellate jurisdiction - and the Government should not be extricated from choosing 3731 as the proper jurisdiction.

Moreover, the time to file pursuant to 28 U.S.C. § 1291 has run and, this Court does not have jurisdiction nor authority to extend filing beyond 30 days - to an aggregate 90 days. F.R. App.P. Rule 4 (a).

Should the appellate jurisdiction over this appeal be proper. Well, then, the Order of the Court below rendered on June 22, 1977 should be affirmed notwithstanding the Government's absolute reliance upon Edwards v. United States, ____F.2d.____, (G Br p.5). Edwards was clearly distinguished because of a guilty plea - as opposed to trial upon the merits. c.f. Enright, suprra, both decisions rendered by the same District Court Judge. c.f. Heimerle v. United States, ____F.Supp.____, with Heimerle on reargument (H App p 63-71), both of which are consistant with the Enright-Edwards Court. Both of which are totally inconsistant with the Edwards Circuit Court analysis,and totally consistant with Davis v. United States, 94 S Ct 2298, 41 L Ed 2d 109 (and cases therein); and Esola v. Groomes, 520 F 2d.830,834-35, that the Interstate Agreement is a"law of the United States" (c.f., fn.2 Edwards Circuit Court). All of which when read in conjunction with United States v. Mauro, 414 F.Supp.358, aff'd 544 F.2d. 588,[wherein the Court held that for purposes of the Interstate Agreement on Detainers, (i) United States is a State (ii) as a State the United States is bound by the Detainer Act and (iii) a writ of habeas corpus ad prosequendum constitutes a detainer within the meaning o f the act. Accord United States v. Ford, 550 F. 2d. 732.] hold that the Interstate Agreement is a law of the United States. And the United States being the thirty-ninth (39) State - for purposes of the IAD - is:

> "...a claim arising under a statute of the United States, specifically PL 91-538 is a claim arising under the 'laws...of the United States within the meaning of 28 U.S.C. § 2254." (ESOLA supra)

Thus, since USCS § 2255 provides a remedy identical in scope to federal habeas corpus to minimize difficulties encountered in habeas corpus hearings by affording the same rights in another more convenient forum. See United States v. Hayman, 342us205,219.

Accord Davis v. United States, supra; see also, Federal Habeas Corpus, (Sokol) 1969 Edition, see also, Davis v. United States, supra,[41 L Ed 2d] annotated at 1193 et seq.

The Edwards Court (C.A.2) under the holding in Mauro can be said to have followed it to the letter -- that is, since the United States in the context of Edwards argument was a State - it follows then, that for purposes of violations of the IAD - a federal prisoner to come under Esola supra, would necessarily have to file under § 2254. However, Davis v. United States, supra, United States v. Hayman, supra, will not bear this out. Also see, Heflin v. United States, 358us419, and Sokol, supra, for the proposition that § 2241 and § 2255 are jointly recognized also under the general habeas corpus statute (Sokol at §§ 24-24.6 & 25).

It is submitted that Esola, supra, (and cases therein); Mauro, supra, did not"blaze new trials" United States v. Travers, 514 F.2d. 1171, but merely enforced what an act of congress mandated - which was,to - enforce the terms of the IAD. The terms of which were in fact known to:

> "...all courts, departments, agencies, officers, and employees of the United States and the District of Columbia.."

because:

> "...the Attorney General shall establish such regulations prescribe such forms, issue such instructions, and perform such other acts as he deems necessary for carrying out the provisions of this[IAD] act..."

and it can hardly be argued that all those compelled to enforce its [IAD] terms - knew not of its existence - because the Deputy Attorney General, Richard G. Kleindienst, stated:

> "...prosecutors also can initiate proceedings to obtain trials of prisoners in other jurisdictions against whom charges are pending - or - detainers have been lodged - temporary - custody is given to the prosecutor for - the purpose - of transferring the prisoner and - holding trial..." (Legislative History,PL 91-538 at 4868)

Yet it appears that:

> " Here Heimerle lost out with respect to a right which no person skilled in the law then would have imagined existed in his favor..."
> (Judge Brieant, Heimerle v. U.S., __F.Supp.__, H App p. 70-71)

because the Attorney General failed to enforce an Act of Congress that he Solemnly swore to enforce [but did not] - by removing Heimerle from another state's custody on three occasions [each time notifying the asylum state that Heimerle would be discharged or tried and sentenced prior to his return to state of imprisonment on the pending charges], and returning Heimerle on two of these occasions without abiding by the mandate of Article IV (e).

Certainly the terms of the Order commanding Heimerle's appearance[s] can only be interpreted as the Court stated:

> "...if a state does take the initiative and bring him from the state of imprisonment to the accusing state it must complete the prosecution before returning him...one purpose of this agreement is to encourage the expiditious and orderly disposition of such charges..." (United States v. Cyphers & Ferro, 556 F.2d. 630)

Moreover, the Government's open admission:

> "Following the hearing, the attorney for the United States, having admitted that the United States had VIOLATED THE INTERSTATE AGREEMENT ON DETAINERS..."
> (Speed v. United States, ___F.Supp.___, appeal dismissed upon Government's motion, ___F.2d.____, see H App p.58,56)

which is commensurate with the Government's position in another part of the country on the very same day:

> " The facts are directly known to the Court and are not in dispute" "...the Government did not wish to answer..."
> (Heimerle v. United States, ___F.Supp.___, and reargument ___F.Supp.___, H App p. 63, 69)

which also corresponds with the Government's position in still another Courtroom on the following day, December 16, 1976:

> " The government argues vigorously that the dismissal of the first indictment was improper because Mauro, which it contends to have been wronly decided, should not be applied retroactively. Because the Government failed to appeal..."
> (United States v. Cumberbatch, 563 F.2d. 49 n.2)

Unfortunately, since the Special Litigation Section entered into the IAD situation most cases were not reported - despite - the controversial nature of habeas corpus application [9] to violations of the IAD. Factually, three (3) Courts granted habeas corpus relief collaterally - and undoubtedly there may be others. However, since the general public and pro se litigants do not control the publishing of favorable opinions - and apparently the Special Litigation Section does. Precedent cases are sparse.

It logically follows that if a waiver must be knowingly and intentionally made as it applies to the IAD - and all that is necessary to invoke or allege:

> "...that one jurisdiction had requested his transfer from another jurisdiction for trial and returned him without trying him to the first jurisdiction..." (United States v. Randall, 429 F.Supp. 18, and cases therein)

Then, it can be said with certainty - Heimerle never waived his rights to statutory compelled dismissal. And accordingly, the Court below properly dismissed the indictment with prejudice.

There is one other point to present that bears on the " good faith " defense that the Government belately presented in Cumberbatch, supra, that is, as it applies to the instant case. First, the Government knew of Heimerle's location and status at the time the instant indictment[s] were handed down by the Grand Jury [see F.N.4 supra]. The delay in arraignment overlaps the time for filing Notice of Appeal[s] in the New York State case[s] - by a matter of days. The plea agreement in the New York State case of November 21, 1972 [sentence commenced this day] was in part; that the order to produce the wiretap Orders, tapes, etc. would be withdrawn. Had arraignment been timely - motions to

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9. The Special Litigation Section specializes in Governmental violations of statutory law. At present it is declaring that hte 21 months of illegal wiretapping of the Morton Halperin home, office, and family was in "good faith" - and the judgment awarded to Halperin ought to be reversed.

to withdraw the plea would have been submitted prior to sentence. Second: the delay in arraignment of approximately Six (6) weeks, from the time the indictment[s] were filed - gave to the Government(sua sponte), an extension that ultimately placed the Government in the position to boast:

> " Heimerle was tried swiftly, well w[illegible]e strictures of (citation omitted) and [illegible]s Court's local speedy trial rules and c[illegible]y within the one hundred anf twenty day period provided for in Article IV(c) of the Agreement" (G App p. A-66-67)

When in actuality, trial was not commenced within these one hundred and twenty days - nor for that matter - within the F.R.Cr.P. Rule 10, or 18 U.S.C. 3161[the latter as it stands today allows arraignment within ten days or dismissal of the indictment(c)(2)] Heimerle well realizes that the latter is not applicable to the instant case - but submits it for the proposition that arraignments are to be prompt - and whatever the decisional law was at the time of Heimerle being indicted - Six (6) weeks without a compelling reason,would not have been proper. Moreover, at the time of arraignment[s] Heimerle's counsel made oral motions to dismiss both indictments for the unreasonable, unexpainable, prejudicial delay. /10

Third: Had the arraignment been timely Heimerle would have then become cognizant that the Government indicted Heimerle for the identical crime for which Heimerle was sentenced for on November 21, 1972 - the Notice of Appeal would have been filed instantly to withdraw the guilty plea - since vice-versa,the State of New York would not have been able to prosecute an offense already prosecuted by the Government. Whereas, it turned out that the Government notwithstanding the Petite Policy,can. See People v. Abbamonte, 22 Cr L 2240 (12/14/77) c.f. United States v. Malizia,

10. Since Judge Carter did not hold a full evidentiary hearing and Heimerle is proceeding as an indigent - the relevant transcript cannot be furnished. Apparently, they were not transcribed. Also, since the Atlanta U.S.P. will not xerox the amount necessary for instant appendix - without payment. Heimerle has been precluded from furnishing documentary proof of identical crimes.

437 F.Supp.952 .

It is submitted that Edwards, nor the Government's choice of United States v. Chico, ____F.2d.____(G App p.A-121-122), is dispositive of the instant case considering the facts and circumstances of all three cases. That is, Heimerle's brief sojourn on the first two writs of habeas corpus ad prosequendum comprised more than a brief stay in federal detention headquarters - and upon each return to New York State Prison[s] - Heimerle was asked by prison officials if he"beat another case" - due to the fact that according to the terms of each of the writs ad prosequendum [not supplied by the Government in their appendix, and not available to Heimerle], the only reasonable inference was that, either of two dispositions were possible,(i) discharge or,(ii) conviction and sentence.

On the third (3rd) occasion, that is, when Heimerle was commanded to appear in federal court to face still more charges - via the writ ad prosequendum, the charges of which caused Heimerle to be sentenced consecutively - well, then, for the first time [after being sentenced], Heimerle was advised of his rights under the IAD (H App p.81-A). At which time the prison official advised Heimerle:"what happened--couldn't beat this case" - it is also notable that the New York State Parole Board wanted to know what all these federal charges were about; they too were of the impression that Heimerle had beat a few cases - prior to "being nailed on the last" - Heimerle was made to max-out [continue to maximum expiration], on the State sentence then being served.

Judge Bartells, who stated that where the IAD is available - it is the sole means of transfer, Mauro, supra, moreover,

> "...it has been held that the Interstate Ageement on Detainers, because it 'is obviously remedial in character,...should be construed liberally in favor of those whose problems were sought to be alleviated' State v. West, 79 N.J. Super. 379,384, 191 A2d 758 760 (App. Div.1966).."

If this Court were to hold as the United States urges, that the:

> "..machinery of the agreement is not the exclusive means of effecting a transfer for the purpose of prosecution on these[18 U.S.C.§§§§ 473,472,371 &2] allegations, then Article IV(c), requiring prosecution within 120 days of arrival, and Article IV(e), allowing only one rendition, would be meaningless.. By this view, this law has wax teeth and is little more than a legislative exercise in futility." People v. Esposito, 37 Misc. 2d 386, 201 N.Y.S.2d 83, 88 (1960)" (accord Esola, supra, at 836)

The Esola Court went on to hold:

> " Our holding that the Agreement provides the exclusive means of transfer when it is available was foreshadowed by and is fully consistent with the recent case of Grant v. Hogan, 505 F.2d. 1220

None of the Courts previously mentioned, supra, have done anything more than to enforce an Act of Congress, viz, the IAD. None of the Courts subsequent to joining the IAD, in anyone of the thirty-nine States, have done more than enforce what legislatures enacted into law: Davis v. United States, supra, held that an intervening change of law[s of the United States] through judicial interpretation - was in fact cognizable under 2255. Therefore, in a"Country of laws - not men"(Ted Kennedy on Disparity,95th Cong. Vol.123,No.4, 1//11/70), a law not enforced by those who were entrusted to execute them - see page 9, supra, - who were bound by their Oath[s] of Office to abide by them, and did not. Two of the provisions [Article IV (c)(e)], both of which,were in fact absolute defenses to the charges contained in the indictments - that by law call for dismissal once a prisoner is returned. Thus, leaving the Court with no jurisdiction over the crime, charges, or defendant-prisoner - since the Court was Constitutionally, bound by Oath, to uphold the law, of the IAD. The burden to enforce the IAD was put on all those contained in Article IX § 5 of the IAD. Not upon motion timely made by the defendant-prisoner.

Nor, for that matter, did the legislatures deem it necessary to include such a provision - the language of the IAD was meant to be clear and unequivocal - and accordingly most Courts have been deferred from finding it any other way:

> " While one may question the wisdom of a sanction so severe, it is a ploicy decision for the legislature and not for the courts — the Legislative language is unambiguous" (State of Maryland v. Kleinbart, (dkt.no.1374) Court of Special Appeals of Maryland, Sept.76 Term(per curiam) filed 8/12/77)

wherein the Court upheld the enforcement of the IAD by the Court below, relying upon Mauro, Esola, Randall, supra, and Commonwealth v. Merlo, ___Pa. Super. 364 A 2d. 391, United States v. Sorrell, 413 F.Supp.138,aff'd en banc, 562 F.2d. 227. [although not relied upon by the Maryland Court - the Court herein should also note the affirmance of another dismissal in tandem with Sorrell, viz, United States v. Thompson, 562 F.2d.232].

The cases relied upon by the Court in Edwards, supra, United States v. Travers,.514 F.2d. 1171, and United States v. Loschiavo, 531 F.2d. 659, dealt with subsequent decisions renderred that made the underlying offenses no longer federal crimes. Alfano v. United States, 555 F.2d. 1128, and Del Vecchio v. United States, 556 F2d. 106, dealt with subsequent decisions that interpreted other court decisions. It is submitted that none of the cases are applicable to a violation of the IAD. And since the IAD was never really interpreted by the Courts - but merely enforced by the Courts - because of the unambiguous-unequivocal language that mandates no other conclusions, than, to dismiss indictments with prejudice, when in fact, the terms are breached. The express language of the IAD's terms defy an interpretation that would deem motions made by uneducated-indigent, unrepresented defendant-prisoners - a prerequisite to the benefits of the rights conferred therein. Moreover, the Government after the

realization of their monumental mistake - in view of Mauro - openly admitted their past violations of the IAD in Speed and Heimerle - these confessions of error (p.9, supra), coupled with their failure to appeal from the dismissal in Cumberbatch id. are not to be so easily set aside. The holding in Santobello v. New York, 404us257; Palermo v. Warden, Green Haven State Prison, 545 F.2d. 286,296, are not inconsistent,because:

> "Additionally, fundamental fairness and public confidence in government officials require that prosecurors be held to'meticulous standards of both promise and performance." (citation omitted) (accord Palermo, supra)

This, standard applied to violations of the IAD - has not been diluted,so as to lose its vitality:

> "The government stated that it had no objection to such a procedure, and it is now bound by that statement."c.f. United States v. Alessi, 536 F.2d.978,981 (accord United States v. LaBriola & Contino, - F.Supp. - , H App pp. 42-43)

United States v. LaBriola & Contino, supra, was a case wherein two indictments had to be dismissed for violations of the IAD; the Court therein, would not allow a belated defense, so as to breach an agreement and besmirch the name of the Court or Attorney General. The Court held that the government was"equitably estopped from raising the issue in the context of the present case."

The significance of the above cited cases is, can the Attorney General of the United States, through his authorized delegates - for whom he alone bears the responsibility:

> "... the central figures are the officials collectively of the United States Department of Justice, Criminal Division, Washington, D.C. (Washington). Except as otherwise authorized by law the Attorney General Shall supervise all litigation to which

> the United States * * * is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys * * * in discharge of their respective duties." 28 U.S.C. § 519; United States v. Jacinto Tin Co. (1888), 125 us273,279, 8 S.Ct. 850, 31 L.Ed 747, 749 (headnote 2); Hogg v. United States, C.A. 6th (1970), 428 F. 2d. 274, 278[2], cert.denied (1971), 401us910, 91 C.Ct. 871, 27 L.Ed. 2d 808. Except as otherwise authorized by law, the conduct of litigation to which the United States * * * is a party * * * is reserved to officers of the Department of Justice, under the direction of the Attorney General." 28 U.S.C. § 516. Because of the exercise of this authority, Washington is the "prosecutor"..." (Accord United States v. Lee, 435 F.Supp. 974, 980)

Thus, when the Attorney Generalconfessed that it was error to return Speed to his State of imprisonment prior to completing prosecution:on November 22, 1976. Then, on December 15, 1976, in another (§ 2255 - habeas corpus) proceeding, wherein the facts and circumstances were on all four with Speed, the Attorney General " did not wish to answer" - then, on still another occasion, the Attorney General chose not to appeal an order rendered in similar circumstances. How, then, can the IAD violations, identical in nature, not be cognizable in some courtrooms at a later date? Presented in the very same manner, viz, habeas corpus!

If, as the government claims at the eleventh hour of their monumental misconstruction of a statute - they acted in "good faith". Why, then, did the government circulate a United States Attornies Memorandum Bulletin advising all United States Attornies to maintain custody of all prisoners secured via the writ of habeas corpus/ad prosequendum or ad testificandum, when in fact the government adamantly persists in advocating the rightness of their actions. Moreover, the reliance upon the subsequent S-1 bill by the government - does not do justice to their argument as the law of the IAD stands today.

If a district judge must administer the law evenhandedly in sentencing:

> " We cannot permit a district judge who is an officer of a national judicial system and who is enforcing a national criminal code to be moved by such considerations of parochialism.." (United States v. Diamond, 561 F.2d. 557[4]

Therefore, can any less significance be placed on enforcing any other national law - as required under the United States Constitution, Esola, supra, concurring opinion.

The Order of the Court below dismissing the indictment should not be disturbed for all of the aforestated reasons. However, should this Honorable Court be otherwise inclined. Heimerle respectfully requests that the appeal from the Order [76 Civ 4277] be put back on the calendar [77-2060]. Or, in the alternative, the court below be required to state findings of fact and conclusions of law.

CONCLUSION

THE ORDER OF THE COURT BELOW SHOULD BE LEFT UNDISTURBED AND THIS APPEAL SHOULD BE DISMISSED

Respectfully submitted,

James F. Heimerle
appelle pro se
PMB 01873
Atlanta, Ga. 30315

AFFIDAVIT OF MAILING

JAMES F. HEIMERLE, being duly sworn, deposes and says:

I have placed into the hand of the undersigned prison official on this ___day Of January, 1978 one box containing ten (10) copies of the Briefs[& Appendix thereto] in re 77-2119; and have also placed in the hand of the same official one copy of the Brief [& Appendix], all of which are to be sent via certified mail,return receipt requested; addressed to :

CLERK, U.S. Court of Appeals
for the Second Circuit
U.S. Courthouse-Foley Square
New York, New York 10007

Hon. Robt. B. Fiske, Jr.
U.S. Attorney/S.D.N.Y.
U.S. Courthouse-Foley Square
New York, New York 10007

James F. Heimerle
Appellee Pro Se
PMB 01873
Atlanta, Ga. 30315

Sworn to before me this

___day of January,1978

H. R. Miller

Public Law 89-318 (79 Stat. 1115) July 7, 1965 to Administer Oaths (18 U.S.C. 4004).

c.c. Irving R. Kaufman
Chief Judge,C.A.2
U.S.Court of Appeals-Foley Square, NY.,N.Y. 10007